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STUDY GUIDE

1. Introduction to the course and its objectives.

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CHAPTER 1: INTRODUCTION

1.1. The importance of the course and its relevance to the field.

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Supreme Court of the United States

October Term, 1946

No. 770

THE CITY OF PORTLAND, a municipal corporation,
Petitioner,

v.

PUBLIC MARKET COMPANY OF PORTLAND, RECONSTRUCTION
FINANCE CORPORATION, and THE FIRST NATIONAL BANK
OF PORTLAND (OREGON),
Respondents.

BRIEF FOR RESPONDENT PUBLIC MARKET COMPANY OF PORTLAND IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Petitioner's brief adopts, as its Statement of the Case, the "Summary Statement" of the petition. Respondent Market Company believes this statement to be inadequate and inaccurate in many respects and that a further explanation of the case is necessary.

The case has been pending in the Oregon courts since 1935. Its original purpose was to secure specific

performance of a contract obligation of petitioner, the City of Portland, to take and pay for certain real property upon which a public market building had been constructed according to the City's specifications. An accounting was also sought; and following recognized equity practice, the complaint prayed for such other and further relief as might be found appropriate.⁽¹⁾

The contract involved was entered into October 28, 1931. By its terms Respondent Market Company agreed to build and equip a market building on land belonging to the Company and to organize therein a public market operation, and the City obligated itself to accept the property as so improved and to pay a stated price plus certain additions. The project was financed through a loan made by Respondent Reconstruction Finance Corporation (herein referred to as the "RFC"). The loan was evidenced by a bond issue of which Respondent The First National Bank of Portland (Oregon) (herein referred to as the "Bank") became trustee.

The complaint alleged performance by the Market Company and a tender of the property and a refusal

(1) Abst. of Rec. 1938 Appeal, 20

(In the references to the record, each appeal to the Oregon Supreme Court is identified by the year in which the appeal was decided.)

by the City to accept it. Respondent RFC and the Bank were unwilling to join in bringing the suit and were therefore made defendants, but in answers thereafter filed they joined the Market Company, and thereafter participated, in seeking the relief prayed for in the complaint.

Petitioner's assertion that the City has not had its day in court requires a careful examination of the steps taken during the long period in which the case has been pending in the Oregon courts. In result, the Supreme Court of Oregon found the City at fault but declined to decree specific performance because the City's plan for financing its purchase of the property had become impracticable if not impossible; and as alternative relief damages were awarded. The course of the litigation may perhaps be more easily followed if the periods terminating with each of the four decisions of the Oregon Supreme Court are reviewed separately.

1935-1938

The City's first defensive move was a demurrer to the complaint. This advanced the contention that the contract did not impose upon the City a general obligation to take and pay for the property, but only an obligation (1) to create, if possible, a fund for

this purpose by attempting to sell to investors an issue of "public market utility" certificates (in effect, revenue bonds based upon operation of the proposed market by the City), and (2) to use such fund when created for the purchase of the market property.

The trial court accepted this view of the contract and sustained the demurrer, taking the position that relief for breach of the contract thus construed was not available, because in the opinion of the court such a special fund contract could not be enforced in equity. This was reversed upon appeal. The majority of the appellate court held that the contract itself, apart from any circumstances which might show a different intent, imposed upon the City a general obligation to purchase the property. The minority disagreed, but nevertheless concurred in the conclusion that the trial court was wrong in sustaining the demurrer, since, as the dissenting opinion pointed out, the Market Company would be entitled to relief if it proved a breach of the special fund obligation; the nature of that relief could be determined, the dissenting opinion said, after the completion of the accounting prayed for. ⁽²⁾

⁽²⁾ Public Mkt. Co. v. City of Portland, 160 Or. 155, 194, 83 Pac. (2d) 440, 456.

1938-1942

Upon the return of the case to the trial court the City answered and the case was thereafter tried. The decision first announced by the trial court held merely that the contract, interpreted in the light of the circumstances shown, did not impose upon the City a general obligation to purchase the property.⁽³⁾ Upon the Market Company's protest that this did not dispose of the controversy since the Market Company would be entitled to relief for any breach by the City of the obligation to create the special fund required and with it to purchase the property, the issues were re-argued and thereafter a supplemental opinion was filed which held that the Market Company had not fully performed on its part; upon this ground the trial court declined to pass upon the question of fault on the part of the City.⁽⁴⁾ A judgment of dismissal was thereupon entered.⁽⁵⁾ The intimation that the case was dismissed because the Market Company failed to amend its complaint to plead damages for breach of a special fund contract (Petition 12-13) is contrary to the fact. The case was dismissed because of the court's determination that the Market Company

(3) Abst. of Rec. 1942 Appeal, 152

(4) Abst. of Rec. 1942 Appeal, 173

(5) Abst. of Rec. 1942 Appeal, 192

had not performed on its part and therefore could not complain of nonperformance by the City.⁽⁶⁾

Upon appeal, this ruling was held erroneous. The City had contended that the contract required the Market Company to tender a market in operation and earning a profit. This contention was rejected by the appellate court; the court held that the subject of the contract was not a market business but a physical plant fully organized and prepared for business. The court's conclusion was that the Market Company had fully complied with its obligations under the contract.

The appellate court then reviewed the evidence and found the City guilty of a deliberate and unwarranted repudiation of its obligations under the contract. The court approved the conclusion of the trial court that only a limited, or "special fund" obligation was intended by the contracting parties, and then determined that the remedy of specific performance of the contract thus interpreted was not available. The City's repudiation of the contract, the protracted litigation, and other circumstances made it altogether unlikely that the project could still be financed through the contemplated sale of securities.

⁽⁶⁾ 171 Or. 522, 531, 130 Pac. (2d) 624, 628

The court then undertook to ascertain what alternative relief was available and applied the rule of the local improvement cases, under which municipalities have been held liable *ex delicto* for the contract cost of an improvement where there had been a failure to levy the assessment or create the fund required for the project. This meant an award of damages equal to the total sum due the Market Company under the contract, but subject to a deduction representing the value of the property left in the hands of the Market Company at the time of the rejection of the tender. The case was remanded to the trial court for an accounting to determine the amount payable under the contract and to ascertain the value of the property at the time of the tender and its rejection; judgment to be entered against the City for the excess, if any, of the former sum over the latter.⁽⁷⁾

It is this decision (in 1942) which, according to the City's contention, denied it due process of law. The later decision, to which the petition for certiorari is addressed, merely approved (subject to a modification upon the valuation question) the trial court's action in giving effect to the 1942 decision. Yet the City did not avail itself of its right to seek a rehearing following the 1942 decision.

⁽⁷⁾ 171 Or. 522, 587-596, 130 Pac. (2d) 624, 649-653

1942-1943

The Market Company and the RFC and the Bank asked for an amplification (through a petition for rehearing) of the 1942 decision to determine whether the award of damages when ascertained should carry interest from the date of the breach of contract, November 14, 1934. The question was briefed and argued and on June 15, 1943, the Supreme Court of Oregon handed down a supplemental decision directing the addition of interest to any award of damages made pursuant to the 1942 decision.⁽⁸⁾

1943-1946

Upon the return of the case to the trial court, the Market Company amended its complaint to state its contention as to the value of the market property at the time of the breach of contract and to add a prayer asking, as alternative relief, for judgment for the total sum due under the contract, less whatever should be found to be the value of the property at the time of the breach.⁽⁹⁾

The City filed an answer to this amended complaint alleging that acts and omissions by the Market Company had prevented the City from offering the con-

⁽⁸⁾ 171 Or. 621, 138 Pac. (2d) 916

⁽⁹⁾ Abst. of Rec. 1946 Appeal, 2

templated issue of securities to the investing public and from creating the fund to be used for the purchase of the market property; and the answer asserted that the City had not had an earlier opportunity to make this defense, and that refusal to permit the defense to be made would deny the City equal protection of the law and deprive it of its property without due process of law.⁽¹⁰⁾

The trial court ruled that this issue had been tried and decided against the City in the earlier stages of the litigation. The court nevertheless permitted the City to introduce evidence in support of its contention, under the local rule⁽¹¹⁾ designed to make a complete record available (in suits in equity) in the event of an appeal. Witnesses thereupon testified that the proposed security issue would not have been salable, but the trial court held this evidence insufficient to show that the City could not have succeeded in financing the project in the manner contemplated had it made a bona fide and sustained effort to do so.⁽¹²⁾

Judgment was thereupon entered against the City for \$791,666.67, made up as follows:⁽¹³⁾

(10) Abst. of Rec. 1946 Appeal, 54

(11) 2 Oregon Comp. Laws Ann. Sec. 9-202

(12) Appendix to Resp. Br. 1946 Appeal, 191, 227

(13) Abst. of Rec. 1946 Appeal, 110

Total sum due under contract,	\$1,463,943.96
Less value of property at time of breach,	963,943.96
Damage award,	\$ 500,000.00
Interest from November 14, 1934,	291,666.67
Total award,	\$ 791,666.67

The City thereupon appealed. The Market Company, RFC, and Bank cross-appealed upon the ground that the trial court had overvalued the property and had thereby reduced the damage award too greatly. The Supreme Court of Oregon rejected the City's contention, holding that the issue attempted to be raised—whether the City was at fault in failing to attempt performance of its contract obligation, and whether there was any primary or contributory fault on the part of the Market Company—had been fully tried and decided against the City in the earlier proceedings. Upon the cross appeal the court held that the property had been overvalued by the trial court; and \$800,000 was adopted as the correct value figure. This increased the damage award to \$663,943.96. The trial court was directed to enter judgment for this amount, with interest from November 15, 1934. The interest was later computed at \$471,732.11, so that the judgment finally entered is for the sum of

\$1,135,676.07. A petition for rehearing thereafter filed by the City was denied without an opinion.⁽¹⁴⁾

The City's petition to this Court for a writ of certiorari seeking a review of the proceedings and a reversal of this judgment was thereafter filed.

⁽¹⁴⁾ 170 Pac. (2d) 586

ARGUMENT

Analysis of Petitioner's Contention

Petitioner's contention, briefly stated, is that the question of nonperformance by the City, in failing to take steps to create the fund to be used in the purchase of the market property, was decided against it without giving the City an opportunity to make its defense. The petition and brief attempt to ignore the fact that there had been a fair trial, with the fullest opportunity to defend on all possible grounds, of the question of nonperformance by the City in repudiating any and all obligations under the contract. The resolution adopted by the City Council, rejecting the tender of the property, stated⁽¹⁵⁾ that

“ . . . the City of Portland recognizes no duty upon its part to comply with any terms of any alleged agreement between it and the Public Market Company and particularly with reference to that document dated October 28, 1931, . . . ”

The City's attempted justification of this repudiation (in defending the suit) was based on a number of grounds; and the questions presented constituted the principal issues of the trial in the circuit court, and before the state Supreme Court in the 1942 appeal.⁽¹⁶⁾

⁽¹⁵⁾ Book of Exhibits, 1942 Appeal, 300

⁽¹⁶⁾ 171 Or. 522, 579-592, 130 Pac. (2d) 624, 646-651

In result, petitioner is contending that the City, although found guilty, after a fair trial, of an unwarranted repudiation of *all* obligations under the contract with the Market Company, is nevertheless entitled to another hearing upon the question whether it was at fault, or "negligent", in failing to perform certain specific obligations necessary to its performance of the contract. Performance by the City, as the contract was finally interpreted by the Oregon Supreme Court, meant simply a good faith effort to finance the project through an issue of securities and the use of the fund thus raised in the purchase of the property. Petitioner seems to argue, first, that a breach of this obligation was not established by the finding that the City had repudiated the entire contract obligation, second, that to establish such a breach it would be necessary to show negligence on the part of the City, and third, that the Supreme Court of Oregon, in the 1942 decision, found the City guilty of such negligence without giving the City an opportunity to meet the charges of negligence or to show contributory negligence on the part of the Market Company.

**Petitioner Has Had Its Day in Court
Upon the Issue It Now Seeks to Raise**

Petitioner's contention that the question of the City's "negligence" in failing to perform its contract

obligation is still open despite the adjudication that the City wrongfully repudiated the entire contract obligation, seems absurd. But the contention is not merely absurd; to imply, as it does, that the City was ready and willing to perform and that performance was prevented by acts or omissions of the Market Company, evades the truth. The City deliberately embarked on a course of repudiation of the contract long before the Market Company tendered the property; and its decision to take this course was not in the slightest degree attributable to anything done or omitted by the Market Company.

This was the conclusion of the Supreme Court of Oregon upon the facts shown by the record. The facts are reviewed at length in its last decision and the conclusion is expressed as follows:⁽¹⁷⁾

“The charge now made that it was the conduct of the plaintiff which prevented the issuance and sale of public utility certificates is an after-thought; the truth is that the city’s disregard of its duty was the result of its decision that it did not want the market building and did not wish to engage in the market business. We said in our former opinion, in speaking of this very matter, that the city was guilty of ‘an outright and unwarranted refusal to be bound by its lawful undertaking.’ 171 Or. 590, 130 P. 2d 650.

⁽¹⁷⁾ 170 Pac. (2d) 586, 592-594

Not only is that statement the law of the case, but nothing that has been called to our attention since it was made furnishes any ground for thinking that it was not just and correct."

It is difficult to ignore the misrepresentations which are implicit in the statements made to this Court. But if it can be assumed that petitioner's contention here is made in good faith, there is an immediate answer in the fact that the issue now sought to be raised—whether the City was justified in refraining from any effort to create the fund required for the purchase of the market property—was comprehended by and necessarily included within the issue upon which the City was given the fullest opportunity to be heard, viz., whether the City was justified in its repudiation of the contract in its entirety.

Petitioner's argument to the contrary is difficult to follow. Apparently it assumes that the case as originally brought could only give relief to the Market Company if its contention that an obligation to buy the property out of general funds was upheld. Upon this assumption the award of damages for nonperformance of the contract (interpreted as obligating the City to pay for the property out of a special fund to be created) is characterized as a conversion of the case into a tort action based on claims of negligence, with no advance notice to the City that any such issue

was involved.⁽¹⁸⁾ Petitioner is wrong both in its assumption as to the nature of the case as originally brought and in its idea of the meaning of the decision of the Supreme Court of Oregon.

(1) The Market Company sued in equity to enforce the City's obligation to purchase the property. The complaint invoked the equitable powers of the court to grant whatever relief might be found appropriate if, for any reason, specific performance could not be decreed. The prayer for specific performance was equally applicable whether payment under the contract was to be made out of general funds, or out of a special fund to be created; and similarly, the prayer for alternate relief included the remedy of damages for nonperformance, whether simply the failure to pay out of general funds or the failure to take the steps necessary to create the fund required and then to make the payment contracted for.

Petitioner cannot truthfully say that it did not so understand the complaint or that the City had no notice, prior to the 1942 decision of the Oregon Supreme Court, that the case might involve the question of nonperformance through failure to create and make use of a special fund and the remedy available therefor.

(18) Petition and Brief, 21, 22, 28, 36-37

The first appeal (decided in 1938) challenged a decree of dismissal which reflected the view of the trial court that the contract imposed only a limited, or special fund, obligation upon the City, and that there was no remedy available for a breach of that obligation. The majority of the appellate court disagreed with the trial court's interpretation of the contract. The minority's dissent, although accepting the special fund theory of the contract, agreed with the majority that the order of dismissal was erroneous; the dissenting opinion pointed out that in either case (whether the City had undertaken a general or only a limited obligation), it was the duty of the court, if nonperformance by the City and full performance by the Market Company were shown, to ascertain what relief should be afforded the Market Company.⁽¹⁹⁾

Again, when the case went back to the trial court and when, after a trial, the court decided that in the circumstances shown the contract was not a general obligation contract, and mistakenly assumed that this disposed of the controversy, the Market Company made it clear that relief was sought for the City's repudiation of its contract, whether interpreted as imposing a general or only a limited obligation. The trial court refused to grant relief for nonperformance

⁽¹⁹⁾ 160 Or. 155, 194-195, 83 Pac. (2d) 440, 456

of the limited obligation, not because that was outside of or beyond the issues of the case, but because of the trial court's mistaken belief that the Market Company had failed to perform its obligations under the contract and was not entitled to *any* relief.⁽²⁰⁾

In its appeal from this ruling (the 1942 appeal), the Market Company pressed its contention that if the City's obligation was limited as claimed, and if specific performance of the limited obligation had become impossible or impracticable, damages should be awarded, and the rule of the local improvement cases, imposing liability *ex delicto* for the amount that would have been paid had the special fund been raised as contemplated, was invoked.⁽²¹⁾

The City's answering brief, although protesting at one point that the issue of damages was not before the court, at another freely admitted that damages measured by the contract price would be recoverable, under the rule of the local improvement cases, if the City had breached its obligation to create, or attempt in good faith to create, the special fund required for the purchase. The brief said:

"The City's officers had a definite duty to per-

⁽²⁰⁾ 171 Or. 522, 531, 130 Pac. (2d) 624, 628

⁽²¹⁾ Appellant's Brief, 1942 Appeal, 217-265

form under penalty of suffering a general obligation against the City."⁽²²⁾

There can be no question, therefore, that the case as brought and as submitted to the Oregon Supreme Court upon the 1942 appeal, was not limited as petitioner now assumes, but included the issue of relief for nonperformance of the obligation to purchase the market property through the creation and use of a special fund.

(2) Petitioner seems to concede that courts of equity have broad power to grant relief other than that specifically prayed for, provided only that it is suited to the case made by the complaint.⁽²³⁾ It need hardly be added that "the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances."⁽²⁴⁾

But petitioner apparently denies that damages ex delicto—for breach of contract—can be awarded in equity. According to its brief (page 36), the damages awarded here could be given only in

" . . . a case as in tort based on allegations of

⁽²²⁾ Respondents' Brief, 1942 Appeal, 521

⁽²³⁾ Petition and Brief, 41

⁽²⁴⁾ Porter, *Admr. v. Warner Holding Co.*, 90 L. Ed. Adv. Op. 994, 996

negligent acts on the part of the City proximately resulting in damages to a certain amount to the contractor, and with opportunity for the City to make a defense on denial of such negligence and proximate damage, and show that the damage, if any, sustained by the contractor, was the proximate result of negligence on its part."

Upon this theory it is said repeatedly in the petition and brief that the Supreme Court of Oregon found the City guilty of negligence without giving the City an opportunity to disprove the charges of negligence or to show contributory negligence on the part of the Market Company.⁽²⁵⁾

Petitioner does not explain why it is thought that damages for breach of contract can be given only when negligence is alleged and proven; and the petition and brief completely ignore the plain statement of the Oregon Supreme Court, in the decision upon the 1942 appeal, that the liability of the City was predicated not upon negligence, but upon a deliberate and unwarranted repudiation of the contract. The court said:⁽²⁶⁾

"The local improvement cases have been cited and relied on by the Market Company. Counsel for the City, on the argument and at one point in their brief, conceded their applicability,

(25) Petition and Brief, 21, 22, 28, 36

(26) 171 Or. 590, 130 Pac. (2d) 650

though at another point in their brief they take a contrary position, because, it is said, the rule of these cases applies only when a municipality is negligent, and there is no evidence of negligence here. But, if the City was not guilty of negligence, it was guilty of something worse—an outright and unwarranted refusal to be bound by its lawful undertaking. Under the broad principle of which the local improvement cases furnish an illustration, negligence is not the touchstone, but the failure, whether intentional or otherwise, to use the diligence which 'the contract itself imports.' *White v. Snell*, supra; 12 Am. Jur., Contracts, 886, Sec. 329; 17 C.J.S. Contracts, 939, Sec. 456d."

As this decision points out, municipalities incur liability ex delicto for what is due under a contract for a public improvement, where there has been a failure to create the special fund required for the project, whether the failure is due to lack of diligence or to a deliberate and intentional refusal to act. The City was held liable here because it had deliberately and intentionally refused to abide by its contract. Petitioner's representation to this Court that the damage award against the City rests on a finding of negligence is contrary to the fact.

The defense which petitioner now says it should be allowed to make in order to show that it was not negligent and that the Market Company was guilty

of contributory negligence, is the same defense offered by the City as its excuse for repudiating all obligation under the contract. At the trial which preceded the 1942 appeal, the City attempted to show that the Market Company had failed, in a number of particulars, to complete the market as required by the contract, and that such failure made performance by the City impossible. This attempt failed. The Supreme Court of Oregon ruled that the Market Company had fully performed on its part; and the nonperformance by the City was attributed to a deliberate abandonment of the project which was planned and carried out without reference to what the Market Company had done or had failed to do in its effort to meet the requirements of the contract.

The petition and brief indicate that precisely the same defense is to be offered upon the issue as proposed by the City, that is, whether the City lacked diligence in its supposed efforts to perform and whether performance was hindered or prevented by acts or omissions of the Market Company.⁽²⁷⁾ Apparently the evidence relied upon is for the most part that which was submitted at the trial which preceded the 1942 appeal. What is intended by way of additional proof is shown by the testimony offered by the

⁽²⁷⁾ Petition and Brief 48, 55

City, and received subject to objection at the last trial, when the amount of the damage award was ascertained by the trial court.⁽²⁸⁾

Specifically, the City's proposed defense is (a) that it would have been impossible, at the time of the tender of the property or thereafter, to finance the acquisition of the property through an issue of municipal securities, and (b) that this was not due to any lack of diligent effort toward performance on the part of the City, but was attributable to the Market Company's failure to provide a market which conformed to the requirements of the contract. This was the defense relied upon in the trial which preceded the 1942 appeal. The repudiation of the contract was a matter of record; the City's explanation (made for the first time when it filed its answer after the first appeal) was that the project had failed for reasons for which the City was not responsible and that the proposed security issue had therefore become unsalable. The defense was rejected in toto. The court held that the way to have tested the salability of the securities was to make a good faith effort to sell them,⁽²⁹⁾ and that if they had in fact become unsalable, it was only because the City Commissioners, by

⁽²⁸⁾ Transcript 1946 Appeal, 1091, 1130

⁽²⁹⁾ 171 Or. 592, 130 Pac. (2d) 651

official as well as unofficial acts and statements, had theretofore made it plain that the City was not going into the public market business.⁽³⁰⁾

The City has therefore had its day in court upon the issues it now says were decided against it without a trial. These issues controlled the question of the City's liability for nonperformance of the contract. They involved no claim of lack of diligence in efforts looking toward performance. No such question arose or could arise because the City never undertook performance. The representations now made to this Court misstate the issue upon which the City was held liable to the Market Company and the RFC. The finding that the City deliberately and intentionally refused without justification to perform its contract obligation forecloses any contention that the City was not guilty of negligence with respect to its obligation.

Inadequacy of Proposed Defense

The jurisdictional statement of the petition and the statement of "The Question Presented" seem to indicate that petitioner's complaint is not so much that it was denied an opportunity to present evidence to show due diligence on its part, but rather that it was not given advance notice of this issue, and therefore did

⁽³⁰⁾ 170 Pac. (2d) 592

not have a fair opportunity to meet the charge of negligence or to prove fault on the part of the Company.⁽³¹⁾

But if it could be said that the City did not have adequate notice of the issues involved in its repudiation of the contract, the defense now suggested is simply that the Market Company was required to turn over an operation with demonstrated earning capacity, that it did not do so, and that because of this the City refrained from any attempt to offer to investors its proposed issue of securities. We have already pointed out that this defense was urged by the City in the trial of the case and was rejected first, because it misinterpreted the contract, and, second, because it was not borne out by the facts.⁽³²⁾

At the supplemental trial following the 1942 appeal, when petitioner asserted the right to a trial of the supposed issue of negligence, it was not denied the right to present additional evidence deemed pertinent to this issue. Some additional testimony was offered, going chiefly to the question of the salability of the security issue through which the City was to raise the fund required for the purchase of the

⁽³¹⁾ Petition and Brief, 21-22

⁽³²⁾ 171 Or. 590, 130 Pac. (2d) 650; 170 Pac. (2d) 592, 594

property.⁽³³⁾ This testimony was received subject to objection.

The trial court held that the question of fault on the part of the City, whether the result of negligence or wilful design, was foreclosed by the prior decision of the Oregon Supreme Court, but the court nevertheless expressed the view that petitioner's testimony upon this question failed to prove what was claimed for it. The witnesses testified merely that in the conditions prevailing in November, 1934 (when the property was tendered) and thereafter, the City's proposed security issue could not have been sold successfully. There was no attempt to show what might have been accomplished in this respect if the City's representatives had not theretofore made it perfectly clear to the public that the City would not undertake or give support to the municipal market project, upon the earnings of which the proposed security issue was to depend. The trial court commented upon the City's evidence as follows:⁽³⁴⁾

"There has been no satisfactory showing of any kind that with a bonafide and sustained effort upon the part of the City and all interested the certificates could not have been satisfactorily disposed of within a reasonable time. As a matter

(33) Transcript 1946 Appeal, 1091, 1130

(34) Appendix to Respondent's Brief 1946 Appeal, 227

of fact, the public market, municipally operated, never had a fair trial. Much is spoken and written with reference to the disastrous experience of municipally owned markets, but the court is convinced of the soundness of Judge Lusk's expression when he says:⁽³⁵⁾

'No one can say now, on this record, with any assurance that the market would not have prospered had the City carried out its engagement in good faith. The representations made by the Market Company related to a market to be owned and operated by the City. It would have been practically a monopoly. Had the City's enthusiasm for a municipally owned market continued unabated, had it made a good faith effort to sell the public utility certificates, had it accepted the property and operated the market, for all that anyone can now determine there might have been a different story. The Market Company has been compelled to contend with conditions that were never contemplated and for which it is not responsible. Competition has come from another public market a few blocks distant; while, as the record discloses, the City's attitude and the uncertainty in the minds of tenants and prospective tenants as to whether the City would take over the market injured the business in its very beginning. The unfortunate experience of the Market Company is not to be taken as a criterion of what the City might have accomplished. Municipal ownership and operation have never been tried; had they been, the

(35) 171 Or. 586, 130 Pac. (2d) 649

faith of the promoters of the enterprise would, perhaps, have been vindicated. We think that the charge, or intimation of fraudulent conduct on the part of the Market Company is baseless and without foundation.' "

Upon the City's appeal from this decision (the 1946 appeal), the Supreme Court reviewed at length the evidence which led to the conclusion quoted by the trial court from the 1942 decision. The court then said: ⁽³⁶⁾

"We said in our former opinion, in speaking of this very matter, that the city was guilty of 'an outright and unwarranted refusal to be bound by its lawful undertaking.' 171 Or. 590, 130 P. 2d 650. Not only is that statement the law of the case, but nothing that has been called to our attention since it was made furnishes any ground for thinking that it was not just and correct."

It appears, therefore, that while the Oregon courts have not been willing to accept petitioner's contention that proof of negligence is essential to liability for nonperformance, the evidence relied upon by petitioner to show lack of negligence has been examined and found inadequate. Of course petitioner could not establish that it made diligent efforts to create the fund required for performance. Petitioner's conten-

⁽³⁶⁾ 170 Pac. (2d) 494

tion that there is an issue upon which it has not been heard is frivolous.

Two additional considerations indicate that this characterization of petitioner's contention is fully warranted:

(1) *Due Process Claim an Afterthought*

The City accepted without protest the 1942 decision of the Oregon Supreme Court which is now said to have converted the case into a negligence action and to have decided the negligence issue without giving the City a chance to be heard. This decision was announced on November 2, 1942. The City did not seek a rehearing nor did it suggest that its constitutional rights had been invaded. Ample opportunity was afforded for any such suggestion since the case was not at once remanded but remained before the court for more than seven months after the announcement of the decision.

The Market Company and the RFC and Bank asked for and secured a rehearing to determine whether the damages to be awarded should include interest from the date of the City's default. Briefs and oral argument were called for and as a result the 1942 decision did not become final until June 15, 1943, when the

court amplified it by passing upon the interest question.⁽³⁷⁾

The City had contended in the 1942 appeal that the question of damages for nonperformance of the obligation to create the special fund was not properly before the court (although the question was in fact argued in the City's brief), but it was not suggested that the court could not consider the question without a denial of rights under the Constitution of the United States.⁽³⁸⁾

The due process contention was first advanced in an answer filed by the City when the case was remanded to the trial court.⁽³⁹⁾ It is obviously an afterthought evolved in the hope of finding some way to retry the issues decided against the City.

(2) *Each Question Presented has already been Tried*

We have already pointed out that petitioner's defense, if it is entitled to a trial upon the charge that it was *negligent* in not putting forth efforts to create the fund required for the performance of the contract, is that the Market Company was obligated to provide an operating public market which would

(37) 171 Or. 586, 130 Pac. (2d) 649

(38) Respondent's Brief 1942 Appeal, 555-576

(39) Abst. of Rec. 1946 Appeal, 49, 65, 68

support the security issue contemplated by the City, that it failed to do this, and that the City did not go ahead because of this failure on the part of the Market Company.

Each of the questions which would be presented by this defense has already been fully and fairly tried. The specification of errors in petitioner's brief (pages 28-32) makes this perfectly clear. It is said that the "overall" error is the conversion of the case into a negligence action, but the brief explains that this general error was the result of twenty-two particular errors which are then stated. The errors thus catalogued (other than those challenging the conclusion and invoking the supposed Federal right) are all alleged mistakes in the 1942 decision upon the questions of contract performance presented by the record and properly before the court for disposition.

No. 1, for example, is that the court erred "in holding that the Company had fully performed on its part"; and Nos. 18 and 19 assign error in the ruling that performance by the City was not prevented by the Company. Nos. 2, 19, 20 and 21 complain of the ruling that the Company made an adequate tender of the property, and that the City wrongfully repudiated the contract. Nos. 3 and 6 challenge the rule

of damages applied (the rule of the local improvement cases), and No. 5 criticizes the 1943 decision, allowing interest from the date of the breach.

The basic contention advanced by petitioner throughout the protracted litigation, and now urged upon this Court, is that the Market Company made performance of the contract impossible. The brief says (page 48) that the Company "destroyed the salability of the securities which were to be offered investors by the City." This contention, though fully and fairly tried, and decided adversely to petitioner, is the essence of the claim of error made to this Court.

Thus in result petitioner is seeking to retry the questions which were decided against it after a trial. The reason given for this request is that the Market Company was not demanding, in the trial in which the questions were decided, the kind of relief that was ultimately given. We have already pointed out that the Market Company was demanding, from the inception of the case, complete relief because of the City's unwarranted refusal to abide by its contract.

It need only be added that the City joined in presenting to the Oregon Supreme Court, in the 1942 appeal, the precise question of relief for nonperformance of the obligation to create the special fund required for the purchase of the market property. At

one point in its brief the City admitted that failure to take steps to create the special fund would impose a general obligation upon the City for the cost of the project; elsewhere in the brief it was argued that this question was not within the issues made by the pleadings. But after stating and arguing this contention, the brief undertook to meet the issue, advancing the same arguments against an award of damages for nonperformance of the special fund requirement that appear in the petition and brief addressed to this Court—the arguments that petitioner would have this Court believe it has never had an opportunity to make.⁽⁴⁰⁾

Respondent Market Company respectfully submits that petitioner has had its day in court upon the questions raised and that the petition for certiorari should be denied.

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⁽⁴⁰⁾ Respondent's Brief 1942 Appeal, 521, 555-576